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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 UNITED STATES OF AMERICA,  
11 Plaintiff,

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13 vs.

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16 MIGUEL ANGEL GARIBAY (2),  
17 Defendant.

CASE NO. 10CR2690-MMA-2

*Related Case No. 13CV2822-MMA*

**ORDER SUMMARILY  
DISMISSING DEFENDANT'S  
MOTION UNDER 28 U.S.C. § 2255  
TO VACATE, SET ASIDE, OR  
CORRECT SENTENCE;**

[Doc. No. 105]

**DECLINING TO ISSUE A  
CERTIFICATE OF  
APPEALABILITY**

18  
19 On October 22, 2010, Defendant Miguel Angel Garibay was charged in a five  
20 count Second Superseding Indictment with conspiracy to import methamphetamine,  
21 in violation of Title 21 of the United States Code, sections 952, 960, and 963;  
22 conspiracy to distribute methamphetamine, in violation of sections 841(a)(1) and  
23 846; and possession of methamphetamine with intent to distribute, in violation of  
24 section 841(a)(1). *See* Doc. No. 23. Defendant initially entered a plea of not guilty  
25 to the charges and moved to suppress all evidence obtained by the government as a  
26 result of a search of his vehicle prior to his arrest. *See* Doc. No. 35. After  
27 conducting an evidentiary hearing, the Court denied the motion to suppress. *See*  
28 Doc. No. 45. Defendant moved for reconsideration, which the Court also denied.

1 See Doc. Nos. 47, 50.

2 On July 5, 2011, pursuant to a conditional plea agreement, Defendant pleaded  
3 guilty to Count 5 of the Second Superseding Indictment, for possession of  
4 methamphetamine with intent to distribute. See Doc. No. 23. The Court sentenced  
5 Defendant on September 19, 2011 to the minimum mandatory term of imprisonment  
6 of ten years. See Doc. No. 79. Pursuant to the terms of his conditional plea,  
7 Defendant filed a direct appeal challenging the Court's denial of his motion to  
8 suppress. See Doc. No. 77. On December 20, 2012, the Ninth Circuit affirmed the  
9 Court's ruling in a memorandum disposition. See Doc. No. 104. The circuit court  
10 denied Defendant's petition for a panel rehearing or rehearing en banc. See Doc.  
11 No. 103. The Ninth Circuit issued its mandate on March 11, 2013. See Doc. No.  
12 104. On April 29, 2013, the Supreme Court denied Defendant's petition for a writ of  
13 certiorari.

14 Defendant now moves to vacate his conviction pursuant to Title 28 of the  
15 United States Code, section 2255, arguing that he received ineffective assistance of  
16 trial counsel. See Doc. No. 105. For the reasons set forth below, the Court  
17 summarily **DISMISSES** Defendant's motion.

## 18 DISCUSSION

### 19 *1. Motion to Vacate, Set Aside, or Otherwise Correct Sentence*

20 Title 28 of the United States Code, section 2255 provides that if a defendant's  
21 motion, file, and records "conclusively show that the movant is entitled to no relief"  
22 the Court summarily may dismiss the motion without sending it to the United States  
23 Attorney for response. See 28 U.S.C. § 2255(b). The rules regarding Section 2255  
24 proceedings similarly state that the Court summarily may order dismissal of a 2255  
25 motion without service upon the United States Attorney only "[i]f it plainly appears  
26 from the face of the motion, any attached exhibits, and the record of prior  
27 proceedings that the moving party is not entitled to relief . . . ." Rule 4(a),  
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1 RULES-SECTION 2255 PROCEEDINGS (West 2009).<sup>1</sup> Thus, when a movant fails to  
 2 state a claim upon which relief can be granted, or when the motion is incredible or  
 3 patently frivolous, the district court may summarily dismiss the motion. *Cf. United*  
 4 *States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989); *Marrow v. United States*, 772  
 5 F.2d 525, 526 (9th Cir. 1985).

6 Here, Defendant's motion is subject to summary dismissal. Defendant alleges  
 7 in a conclusory fashion that his trial counsel was ineffective. In order to prevail on  
 8 an ineffective assistance of counsel claim, a defendant must show deficient  
 9 performance by counsel and prejudice to the defense. *Strickland v. Washington*, 466  
 10 U.S. 668, 687 (1984); *United States v. Swanson*, 943 F.2d 1070, 1073 (9th Cir.  
 11 1991). In the context of guilty pleas, "to satisfy the 'prejudice' requirement, the  
 12 defendant must show that there is a reasonable probability that, but for counsel's  
 13 errors, he would not have pleaded guilty and would have insisted on going to trial."  
 14 *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *see also United States v. Keller*, 902 F.2d  
 15 1391, 1394 (9th Cir. 1990).

16 Defendant first contends that his trial counsel was ineffective for not  
 17 challenging the warrantless search of his vehicle.<sup>2</sup> As an initial matter, Defendant  
 18 fails to allege, much less demonstrate, that but for counsel's purported deficient  
 19 performance, he would have decided not to plead guilty. Furthermore, the record of  
 20 this case plainly contradicts Defendant's claim. Trial counsel prepared and filed the  
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22 <sup>1</sup> Similarly, a court deciding a motion under 28 U.S.C. § 2255 is not required to  
 23 hold an evidentiary hearing if "the motion and the files and records of the case  
 24 conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b).  
 25 "Mere conclusory statements by the petitioner do not justify a hearing." *Baumann v.*  
 26 *United States*, 692 F.2d 565, 571 (1982). Instead, a defendant must make "specific  
 factual allegations which, if true, would entitle him to relief." *Id.* As discussed below,  
 Defendant has failed to allege sufficient facts showing a possible right to relief.  
 Therefore, an evidentiary hearing is not warranted in this case.

27 <sup>2</sup> Defendant also raises a conclusory challenge of the search of his vehicle under  
 28 *Patel v. City of L. A.*, 686 F.3d 1085 (9th Cir. 2012), rehearing en banc granted, 708  
 F.3d 1075 (9th Cir. 2013). Defendant provides no substantive support for this claim.  
 He notes that a petition for rehearing en banc has been granted, but does not indicate  
 how *Patel* is applicable to this case.

1 brief in support of Defendant's motion to suppress, in which he specifically argued  
2 that the search of the vehicle violated Defendant's Fourth Amendment rights. *See*  
3 *Motion to Suppress*, Doc. No. 35 at 14 ("[A]gents searched the car without probable  
4 cause"). At the evidentiary hearing on Defendant's motion, counsel conducted a  
5 lengthy cross-examination of the agents who conducted the search. *See Transcripts*,  
6 Doc. Nos. 64, 65. Even after the Court denied Defendant's motion to suppress, trial  
7 counsel continued to challenge the constitutionality of the search and seizure by  
8 seeking reconsideration of the Court's decision. *See Motion for Reconsideration*,  
9 Doc. No. 47.

10 Defendant also claims that trial counsel was ineffective for failing to  
11 challenge the use of a drug dog during the search and the drug dog's qualifications.  
12 However, the record reflects that trial counsel raised each of these issues as grounds  
13 for suppressing the contraband recovered from Defendant's vehicle. *See Motion to*  
14 *Suppress*, Doc. No. 35 at 15 ("To date, the government has produced nothing to  
15 show that the canine involved in this case, Kunta [sic], was or is reliable at detecting  
16 contraband. The government has thus failed to meet its burden of justifying its  
17 warrantless search of the car driven by Mr. Garibay."). The issues were fully heard  
18 by the Court during the evidentiary hearing, where trial counsel cross-examined the  
19 drug dog's handling agent regarding the search of Defendant's vehicle. *See*  
20 *Transcript*, Doc. No. 64. As Defendant concedes, trial counsel specifically  
21 challenged the drug dog's certification and expertise. *Id.* at 79-80. That this  
22 challenge was ultimately unsuccessful is insufficient to support a claim under  
23 *Strickland*.

24 In sum, this Court "must judge the reasonableness of counsel's challenged  
25 conduct on the facts of the particular case, viewed as of the time of counsel's  
26 conduct." *Strickland*, 466 U.S. at 690. The Court has reviewed the pertinent  
27 portions of the record and concludes that trial counsel's performance in this case did  
28 not fall below the objective standard of reasonableness. Further, Defendant fails to

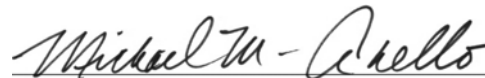
1 demonstrate any prejudice. Because the record “conclusively show[s] that  
2 [defendant] is entitled to no relief,” 28 U.S.C. § 2255, the Court summarily  
3 dismisses Defendant’s motion. *See Johnson v. United States*, 539 F.2d 1241, 1245  
4 (9th Cir. 1976).

5 **CONCLUSION**

6 Based on the foregoing reasons, the Court summarily **DISMISSES**  
7 Defendant’s motion under 28 U.S.C. § 2255 to vacate, set aside, or otherwise correct  
8 his sentence. The Court **DECLINES** to issue a Certificate of Appealability because  
9 Defendant has not made a substantial showing of the denial of a constitutional right.  
10 28 U.S.C. § 2253(c)(2); *see Slack v. McDaniel*, 529 U.S. 473, 483 (2000).

11 **IT IS SO ORDERED.**

12 DATED: December 10, 2013

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14 Hon. Michael M. Anello  
15 United States District Judge  
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